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Annexation and Municipal Voting Rights

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ANNEXATION AND MUNICIPAL VOTING RIGHTS

I. INTRODUCTION

As a general proposition, states have broad discretion to create, expand, contract, or even destroy their subdivisions.[1] A change in the size, shape, or nature of a municipal corporation alters the relative voting strength of groups within and outside of the corporate limits.[2] For example, a city can dilute the voting strength of a minority racial or ethnic group by annexing an all-white territory. In most cases, courts allow the state political process to resolve the propriety of such changes.[3]

Courts occasionally place constitutional limitations on a state's authority over the structure of its local governments where the court finds

1. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). In *Hunter*, the Court approved the consolidation of the cities of Pittsburgh and Allegheny and rejected constitutional challenges based on the contract clause and the due process clause of the fourteenth amendment. The consolidation was without the consent of Allegheny residents. The Court held that "[t]he number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." *Id.* at 178; *but see* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (state's power to redraw the borders of its municipal corporations is constitutionally limited).

2. *See, e.g.*, City of Pleasant Grove v. United States, 479 U.S. 462 (1987) (selective annexation of predominantly white area held to violate the Voting Rights Act of 1965); City of Port Arthur v. United States, 459 U.S. 159 (1982) (discriminatory impact on the black electorate through annexation without a sufficiently curative change in the electoral system held to violate the Voting Rights Act of 1965); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (change in boundaries of the City of Tuskeegee so as to exclude black voters held to violate fifteenth amendment).

3. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Wilkerson v. Coralville, 478 F.2d 709, 715 (8th Cir. 1973) ("Whether Coralville, in the exercise of its powers relating to the annexation of territory, should be permitted to encircle and exclude an impoverished area is a matter of legislative policy for the State of Iowa.").

purposeful discrimination in the extension of the municipal franchise.[4] In such cases, the party challenging the state's action bears the heavy burden of proving both a discriminatory effect on voting rights and a discriminatory intent on the part of the legislative body responsible for the structure.[5] The Voting Rights Act of 1965 (the Act)[6] in some cases removes the plaintiff's burden of proving discriminatory intent.[7] In addition, where there is a history of discriminatory voting practices, the Act places the burden of proving a lack of discriminatory purpose and effect on the state.[8] This shift in the burden of proof creates a tension between the constitutionally protected right to vote[9] and the traditional

4. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). The state legislature of Alabama redrew the boundaries of the City of Tuskeegee so as to exclude all but a few of the city's black voters. The Court found purposeful discrimination in the state's action and held that the rule in *Hunter* does not apply when a state uses its power to infringe on a constitutionally protected right. *Id.* at 344-45; City of Birmingham v. Community Fire Dist., 336 So. 2d 502 (Ala. 1976) (redrawing boundaries of land to be annexed so as to ensure favorable election results violates Constitution).

5. *See Gomillion*, 364 U.S. at 341-42. The Court found that the city had "deprived the petitioners of the municipal franchise, and to that end [had] incidentally changed the city's boundaries." *Id.* at 347; *see also* G. GUNTHER, CONSTITUTIONAL LAW 709 n.7 (11th ed. 1985) (Supreme Court requires a showing of discriminatory intent to allege a constitutional, as opposed to a statutory, violation).

6. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982).

7. *See, e.g.*, Velasquez v. Abilene, 725 F.2d 1017, 1021 (5th Cir. 1984) (the 1982 amendments to the Voting Rights Act require plaintiff to show a discriminatory result as judged by the totality of the circumstances).

8. 42 U.S.C. § 1973b(b) (1982) provides that the Director of the Census must publish a list of states which use "tests" for voting eligibility and where less than 50% of the eligible voters vote. The Code of Federal Regulations lists the following as states and subdivisions subject to §§ 4 and 5 of the Voting Rights Act: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia, and certain named parts of California, Colorado, Connecticut, Florida, Hawaii, Idaho, Massachusetts, Michigan, New Hampshire, New York, North Carolina, South Dakota and Wyoming. 28 C.F.R. app. § 51 (1986).

42 U.S.C. § 1973c provides that a state or subdivision must obtain either a positive finding by the Attorney General, or a declaratory judgment in the District Court for the District of Columbia, that a proposed change in voting "practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote" before the change can take effect. *See also* Georgia v. United States, 411 U.S. 526 (1973) (section 5 shifts the burden of proving lack of discriminatory intent to the state).

9. The fifteenth amendment provides:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

values of comity and federalism.

Parts I-III of this Recent Development outline the evolution of federal review of municipal boundary changes under the Constitution and the Voting Rights Act, culminating in the Supreme Court's recent decision in *City of Pleasant Grove v. United States*.[10] Part IV examines the effect of *Pleasant Grove* and the utility of section 5 of the Voting Rights Act as a tool to combat discriminatory practices.

II. THE TRADITIONAL RULE: CONSTITUTIONAL LIMITATIONS

In *Hunter v. City of Pittsburgh*,[11] the Supreme Court held that states have near plenary power over the political subdivisions they create.[12] In *Hunter*, the City of Pittsburgh wished to merge with the City of Allegheny.[13] The merger, if approved, would have subjected Allegheny residents to higher taxes.[14] In accordance with state law, the cities held a joint referendum.[15] Although a majority of Allegheny residents voted against the merger, a majority of the combined cities' voters approved it, so the merger took effect.[16] Former citizens of Allegheny brought suit against Pittsburgh, alleging that the increased tax burden violated an implied contract between the city and its residents that required Allegheny tax revenues to be spent within the city.[17] The suit also claimed the additional taxes deprived them of property without due process of law.[18]

The Supreme Court found for the City of Pittsburgh on both

10. 479 U.S. 462 (1987).

11. 207 U.S. 161 (1907).

12. *Id.* at 178-79.

13. *Id.* at 164-65.

14. *Id.* at 166. At the time, the City of Pittsburgh was planning to undertake a number of public works projects, including electrical generation and public waterworks. Allegheny had already supplied itself adequately with water and electricity. If the two cities were consolidated, the residents of Allegheny would be forced to subsidize improvements that only benefitted Pittsburgh residents. *Id.* at 165-66.

15. *Id.* at 167. Pennsylvania law provided for the consolidation of two cities by the annexation of the lesser into the larger "if at an election . . . there shall be a majority of all the votes cast in favor of such union." *Id.* at 162.

16. *Id.* at 174-75.

17. *Id.* at 176-77. This claim was based on the contract clause. U.S. CONST. art. I, § 10.

18. 207 U.S. at 177. The plaintiffs made 22 assignments of error, including one claim under the fifth amendment due process clause and another under the comparable provision of the Pennsylvania Constitution. *Id.* at 175. The Court addressed only the two claims mentioned herein. *Id.* at 177.

claims,[19] holding in broad language that a city's actions in accord with state law are not subject to federal constitutional attack.[20] Because cities are merely convenient entities to which a state delegates authority,[21] the court reasoned, a state may constitutionally expand, contract, create, and even destroy its municipal corporations.[22] The court held that the state political processes, not the courts, are the proper forum for resolution of such disputes.[23]

In 1960, the Supreme Court first recognized a constitutional limit on a state's power over its political subdivisions. In *Gomillion v. Lightfoot*,[24] the state legislature of Alabama redrew the boundaries of the City of Tuskeegee so as to exclude most of the city's black families.[25] The legislature's action changed the shape of the city from approximately a square to an "uncouth twenty-eight sided figure."[26]

The excluded black residents brought suit under the due process and equal protection clauses of the fourteenth amendment and section 2 of the fifteenth amendment.[27] The Court held that the state's action violated the fifteenth amendment by depriving black citizens of the right to vote in Tuskeegee municipal elections.[28] The Court recognized the importance of the principles of federalism outlined in the *Hunter* deci-

19. *Id.* at 179. The Court found that there was no contract between Allegheny and its citizens within the meaning of the Constitution, and that neither the plaintiffs nor the city asserted a constitutionally significant property interest to give rise to a due process claim. *Id.* at 180.

20. *Id.* at 179.

21. *Id.* at 178-79. "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them." *Id.* at 178.

22. *Id.* at 178-79.

23. *Id.*

24. 364 U.S. 339 (1960).

25. *Id.* at 341. The city originally had approximately 400 black voters. The redrawn city boundaries excluded all but four or five blacks, while no white voters were excluded. *Id.*

26. *Id.* at 340.

27. *Id.*

28. *Id.* at 346. The Court focused on the petitioners' claim that the state legislature's action deprived them of the municipal franchise in violation of the fifteenth amendment. *Id.* at 347.

Justice Whittaker, in concurrence, asserted that the decisions should be based on the equal protection clause rather than the fifteenth amendment. *Id.* at 349 (Whittaker, J., concurring). Citizens, he reasoned, do not have a right to vote in a division in which they do not reside. They do, however, have the right not to be unlawfully segregated

sion,[29] but found that the Alabama legislature's actions were intentionally designed to deprive the petitioners of the municipal franchise and its consequent rights.[30] Such action, the Court held, removed the controversy from the discretion of the political process and subjected it to constitutional scrutiny.[31]

The *Gomillion* decision stands for the proposition that generally lawful acts may become unlawful when done to achieve an unlawful end.[32] Consequently, a plaintiff who brings a constitutional challenge of a state action which affects voting rights must plead and prove purposeful discrimination.[33]

Although there is no explicit constitutional right to vote at the local level, the Supreme Court characterizes the right to vote as a fundamental political right which serves to protect all other rights.[34] Under modern equal protection analysis,[35] courts apply "strict scrutiny" when examining legislation alleged to infringe upon a fundamental right.[36] Strict scrutiny requires that the legislation be a necessary

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because of their race. *Id. Cf.* Brown v. Board of Educ., 347 U.S. 483 (1954) (segregated school system violates equal protection clause).

In Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978), the Court expressly held that the equal protection clause does not confer the right to vote in municipal elections to nonresidents even when they are subject to the municipality's police power. *Id.* at 64. For a discussion of the related topic of constitutional limitations on extra-territorial action by municipalities, see Comment, *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities*, 45 U. CHI. L. REV. 151 (1977).

29. *Gomillion*, 364 U.S. at 342.

30. *Id.* at 347.

31. *Id.* at 346-47.

32. *Id.* at 347-48 (quoting Western Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918)).

33. *Id.* at 339; *see also* City of Mobile v. Bolden, 446 U.S. 54 (1980) (plurality of Court required plaintiff to show a present-day discriminatory purpose to assert violation of fifteenth amendment).

34. United States v. Carolene Prods. Co., 304 U.S. 144 (1938). Justice Stone in his famous footnote 4 in *Carolene Products* suggested the Court employ a heightened level of scrutiny when the challenged legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," *Id.* at 152. *See also* Rogers v. Lodge, 458 U.S. 613 (1982) (strict scrutiny applied to invalidate an at-large voting system that diluted minority voting strength).

35. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982) (vote dilution unconstitutionally infringed upon the right to have one's vote counted equally).

36. Reynolds v. Sims, 377 U.S. 533 (1964). Justice Warren, writing for the Court, said:

> [Undoubtedly] the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and

means to accomplish a compelling state end.[37] Normally, application of this standard is "strict in theory, fatal in fact."[38] In the area of voting rights, however, some laws survive judicial review even under strict scrutiny.[39]

A state's interest in maintaining control over its political subdivisions, as expressed in *Hunter*, is considered nearly absolute.[40] Absent a finding of blatant discriminatory purpose,[41] the Supreme Court recognizes a state's right to fashion and maintain boundaries that naturally result in denying some groups the right to vote.[42]

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unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id. at 561-62. *See also* Avery v. Midland Co., 390 U.S. 474 (1968) (extending the rule in *Reynolds* to municipal elections). *But cf.* Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977) (applying "mere rationality" standard to uphold New York law that counted votes of two areas of vastly different populations equally).

37. G. GUNTHER, *supra* note 5, at 588; Rogers v. Lodge, 458 U.S. 613, 618 (1982).

38. G. GUNTHER, *supra* note 5, at 588. Gunther asserts that the modern Court employs many different levels of scrutiny. *Id.* While the Court adheres to the view that there are two or at most three levels of scrutiny, Gunther subscribes in part to Justice Marshall's view that there is a "sliding scale" of judicial review. *Id.*

39. *Id.* at 813. Gunther suggests that the Court employs a slightly less exacting standard than traditional strict scrutiny in voting rights cases. *Id. See supra* note 38. *See, e.g.*, Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) where the Court found that the plaintiffs, who resided outside the city limits, had no constitutionally mandated right to vote in Tuscaloosa municipal elections. The Court also held that extension of municipal police power beyond corporate limits without the concomitant right to vote was a permissible exercise of state powers. *Id.* at 72-75.

40. *See supra* notes 1, 12-23 and accompanying text. *See also* State *ex rel.* Vicars v. Kingsport, 659 S.W.2d 367 (Tenn. Ct. App. 1983) (boundary-drawing so as to ensure favorable referendum result held to be constitutional if done within statutory power).

41. *See supra* notes 24-33 and accompanying text.

42. *See* Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) (upholding state's right to extend municipal police power beyond a city's corporate limits without also extending the right to vote); *see also* City of Mobile v. Bolden, 446 U.S. 55 (1980) (plaintiff required to show a present-day discriminatory purpose to allege a fifteenth amendment violation).

III. THE VOTING RIGHTS ACT OF 1965[43]

Section 5 of the Voting Rights Act of 1965[44] requires some states to "pre-clear" changes in voting practices or procedures with either the Attorney General of the United States or the Federal District Court for the District of Columbia.[45] To obtain preclearance, a state must show its proposed change is not discriminatory in purpose or effect.[46]

In *Perkins v. Mathews*,[47] the Supreme Court held that the language of section 5 reaches changes in municipal boundaries effected by annexation.[48] The Court in *Perkins* read congressional intent broadly, holding that changes in a city's boundaries should be considered changes in "voting practices or procedures."[49]

In *Richmond v. United States*,[50] the Court first applied the Act's "purpose or effect" standard to a city's attempt to annex territory.[51] Pursuant to the Act, the city sought approval of its annexation of a predominantly white area.[52] The United States Attorney General initially withheld approval.[53] After agreeing to change its electoral system from a multimember at-large council system to a single-member

43. 42 U.S.C. § 1971 (1982). This paper addresses municipal voting rights affected by changes in municipal boundaries. Only § 5 of the Act is interpreted to reach these kinds of changes. Of related interest is the "totality of circumstances" test incorporated in § 2 in the 1982 amendments. Section 2 allows courts to consider discriminatory effect. *See* Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633 (1983).

44. 42 U.S.C. § 1973c (1982). The Supreme Court held § 5 to be a constitutional exercise of Congress' remedial powers under the fifteenth amendment in *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966).

45. 42 U.S.C. § 1973c (1982).

46. *Id. See supra* notes 8-9. 28 C.F.R. § 51.29 (1987) provides that a state or subdivision seeking preclearance bears the burden of proving that its changes are not discriminatory in purpose or effect.

47. 400 U.S. 379 (1971).

48. *Id.* at 388-90.

49. *Id.* at 387.

50. 422 U.S. 358 (1975).

51. *See* Comment, *Supreme Court Expands Judicial Discretion in Section Five Cases*, 17 SUFF. U. L. REV. 1085 (1983) (Court applied purpose and effect standard to annexation for the first time).

52. 422 U.S. at 363. The annexation resulted in a drop in the black population percentage from about 52% to about 42%. *Id.*

53. *Id.* at 363-64. At the time of the election, the city had a nine-member city council. *Id.* at 363. All members were elected at large. *Id.* The Attorney General denied preclearance because he found that the annexation diluted the voting strength of the black community. *Id.* at 364.

ward system,[54] the city sued in the District Court for the District of Columbia for a declaratory judgment that the annexation did not have a discriminatory purpose or effect.[55] The district court found that the city had undertaken the annexation with a discriminatory purpose and that the change in the voting system did not cure the discriminatory impact to the greatest extent possible.[56] However, the district court declined to order the city to relinquish the annexed territory and delayed fashioning any remedy until the resolution of a pending companion suit.[57]

On direct appeal the Supreme Court reversed, holding that the Act only required fair representation to the black community in the new, enlarged community.[58] The Court found that the proposed electoral system was the result of good faith negotiation with the Attorney General and was sufficient to "cure" any racially discriminatory effect caused by the annexation of a predominantly white area.[59]

A similar situation arose in *City of Port Arthur v. United States.*[60] The City of Port Arthur consolidated with two adjoining cities and annexed an unincorporated area, resulting in a reduction in the percentage of blacks in the city from 45.21 percent to 40.56 percent.[61] Before the change, a mayor and a six-member city council governed the city.[62] All of the council members were elected at-large.[63] The city

54. *Id.* at 366. The new plan proposed four predominantly black wards, four predominantly white wards, and one "swing" ward which was 40.9% black. *Id.*

55. *Id.*

56. *Id.* at 367.

57. *Id.* The companion case, *Holt II*, was filed in the Eastern District of Virginia and sought to invalidate the annexation under § 5 of the Voting Rights Act. *Id.* at 365.

58. *Id.* at 371-72. The Court saw the United States' position as either prohibiting annexations altogether, or requiring that the black community is afforded the same voting strength in the new community as it enjoyed in the old. *Id.*

59. *Id.* at 378. The Court remanded the case to the district court for a determination of whether the city had acted with a discriminatory purpose. *Id.* Justice Brennan, dissenting, asserted that Richmond had not carried its burden of proving that the change was free of any racially discriminatory purpose. *Id.* at 379 (Brennan, J., dissenting). He cited the district court's expertise and its finding that "Richmond's primary, if not sole purpose in annexing the territory" was to discriminate against the black community. Therefore he asserted a remand was unnecessary. *Id.* at 381-82 (Brennan, J., dissenting).

60. 459 U.S. 159 (1982).

61. *Id.* at 162. The black voting population constituted about 35% of the total population. *Id.*

62. *Id.*

proposed a number of revised election plans to the district court in an action for preclearance under section 5.[64] The final plan provided that four representatives would be elected from four single-member districts, two would be elected from larger combined districts, and three representatives, plus the mayor, would be elected at large with a majority vote requirement.[65] The district court found that the plan, assuming racial bloc voting, ensured that blacks could elect only three of the nine representatives.[66] Although the district court found no discriminatory purpose, it denied preclearance, finding that the plan failed to neutralize the discriminatory impact of the city's expansion.[67]

The Supreme Court affirmed.[68] The Court adhered to the *Richmond* Court's holding that an electoral system must fairly represent blacks in the newly enlarged community.[69] Unlike the *Richmond* Court, however, the *Port Arthur* Court deferred to the district court's findings.[70] The Court held that Port Arthur had failed to provide for fair representation of minority interests.[71] The Court did not explain why it chose to defer to the district court's findings of discriminatory effect in *Port Arthur* and not in *Richmond*.[72]

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63. *Id.* Each council member had to reside in a specified district, but the entire city voted on each member. *Id.*

64. *Id.* at 162-63. The city first proposed adding two seats to the existing system with residency requirements in the newly annexed territory. *Id.* at 162. It also submitted a plan whereby four members would be elected from single member districts, four more would be elected at large with residency requirements, and a mayor would be elected with no residency requirement. *Id.* at 163.

65. *Id.* at 164. The plan provided that if no candidate received a majority of the vote, the top two finishers would participate in a runoff election. *Id.*

66. *Id.* Two of the four proposed wards were predominantly black; together they comprised one of the larger combined districts, also predominantly black. *Id.* White majorities would have voted in the races for the rest of the seats (two wards, one combined district, and three at-large seats). *Id.*

67. *Id.*

68. *Id.* at 168.

69. *Id.* at 166.

70. *Id.* at 167.

71. *Id.*

72. *Id.* at 167. Justice White wrote the opinion of the Court in *Richmond*, *Port Arthur*, and *Pleasant Grove*. Although the language of *Port Arthur* implies that the Court adopted Justice Brennan's dissent from *Richmond*, *supra* note 59, the Court may have merely found the facts in *Port Arthur* most favorable to the United States. *See* Comment, *supra* note 51, at 1091. Justice Powell found the cases irreconcilable. 459 U.S. at 169 (Powell, J., dissenting).

In *Pleasant Grove v. United States*,[73] the Court extended the *Richmond* and *Port Arthur* rulings by allowing the district court to consider the potential effects of boundary changes as evidence of an impermissible purpose.[74] In *Pleasant Grove*, an all-white city sought to annex two parcels.[75] No blacks resided in either area.[76] A third adjacent area, the Highlands, which was predominantly black, petitioned the city for annexation,[77] but the city denied this request.[78] The city sought preclearance in the district court for the two annexations.[79] The district court found that the annexation was designed to perpetuate "an all-white enclave in an otherwise racially mixed section of Alabama."[80]

Two major factors led the district court to deny preclearance: first, the city's failure to annex the Highlands was evidence of discriminatory purpose;[81] second, the court found that the city intended to use the annexed territory for white residential development.[82]

On appeal to the Supreme Court, the city argued that even if its failure to annex the Highlands was racially motivated, the decision was not a change with respect to voting and was therefore not subject to section 5.[83] The city also argued that since it had no black population either before or after the annexation, it had not infringed upon minority voting rights.[84] The Court agreed with the first argument in theory, but held that the district court had not exceeded its authority when it considered the city's failure to annex the Highlands as evidence of discriminatory intent with respect to the decision to annex the all-white parcels.[85] The Court rejected the city's second argument, holding that

73. 479 U.S. 462 (1987).

74. *Id.* at 471.

75. *Id.* at 464.

76. *Id.*

77. *Id.* at 466.

78. *Id.*

79. *Id.*

80. City of Pleasant Grove v. United States, 468 F.Supp. 1455, 1455-56 (D. D.C. 1986).

81. 479 U.S. at 467.

82. *Id.* at 466.

83. *Id.* at 470. The city asserted initially that its decision was motivated by economic considerations. The Court pointed out, however, that in its cost-benefit analysis, the city had included the cost of services that it already provided to the Highlands and had failed to include significant potential tax benefits. *Id.*

84. *Id.* at 471-72.

85. *Id.* at 472.

the impermissible "purpose" prohibited by the Act can relate to future as well as present conditions.[86]

In dissent, Justice Powell found no discriminatory voting-related purpose in the proposed annexations.[87] He interpreted the language of the Act to apply only to present effects on black voting rights and called the majority's finding of discriminatory purpose "speculative."[88] Powell claimed the Court improperly considered Pleasant Grove's failure to annex the Highlands as evidence of intent to deny voting rights.[89] Unless there was a showing of retrogression of black voting rights, Justice Powell would find no section 5 violation.[90]

IV. CONCLUSION

Clearly, the *Pleasant Grove* Court did not establish a new principle of constitutional law.[91] The purpose-and-effect standard necessary to make out a constitutional violation remains intact.[92] Nor did the Court depart radically from precedent in its interpretation of the Voting Rights Act. *Pleasant Grove* does represent the Court's first attempt to define the kind of evidence that plaintiffs may use to show a discriminatory purpose under section 5.[93] Discretion remains with the district

86. *Id. Pleasant Grove* strongly suggests that the Court has adopted Justice Brennan's dissent in *Richmond. See supra* note 59. Justice Powell again dissented, suggesting that while there was, in his view, no Voting Rights Act violation, he might have been inclined to find a constitutional violation. *Id.* at 479 (Powell, J., dissenting).

87. 479 U.S. at 475 (Powell, J., dissenting). Justice Powell, joined by Justices Rehnquist and O'Connor, accepted the city's argument that since no blacks resided in Pleasant Grove or in the proposed additions, "the city could not have acted with the purpose to dilute the voting rights of black municipal voters." *Id.* (Powell, J., dissenting).

88. *Id.* at 476 (Powell, J., dissenting).

89. *Id.* at 478-79 (Powell, J., dissenting). "Although we have stated [in *Perkins v. Mathews*] that § 5 reaches changes with the 'potential for racial discrimination in voting,' . . . the 'potential' refers to present and concrete effects, not effects based on speculation as to what *might* happen at some time in the future." *Id.* at 476 (Powell, J., dissenting).

90. *Id.* at 476-77 (Powell, J., dissenting).

91. The case is based on the preclearance provisions of the Voting Rights Act, not the fifteenth amendment or the equal protection clause of the fourteenth amendment. Congress has the power, pursuant to § 2 of the fifteenth amendment, to address discrimination in voting practices. For this purpose, legislation may be remedial in nature and may intrude into areas traditionally reserved to the states. South Carolina v. Katzenbach, 383 U.S. 301, 325-27 (1966).

92. *See supra* notes 24-42 and accompanying text.

93. The Court held that the district court properly took into account the city's failure to annex the Highlands. 479 U.S. at 472.

court[94] to examine the motives of a municipality seeking preclearance.[95]

One commentator suggests that the net effect of the *Pleasant Grove* decision has been to deny a handful of citizens the right to vote in Pleasant Grove city elections.[96] This denial, he and Justice Powell argue, is contrary to the letter and the spirit of the Act.[97] He ignores, however, the remedial nature of section 5.[98] Section 5 is a constitutional exercise of congressional power to remedy the effects of historical discrimination.[99] The Court's decision to forbid the perpetuation and expansion of an "all-white enclave" is both within the constitutional reach of, and consistent with, the spirit of the fifteenth amendment.[100]

The facts of *Pleasant Grove* demonstrate that section 5 of the Voting Rights Act has yet to outlive its usefulness.[101] Section 5 is far from an all-encompassing tool with which the Attorney General can eliminate discrimination at its roots.[102] Under the *Pleasant Grove* standard, however, section 5 ensures that when municipalities change their boundaries, they must do so in good faith.

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94. Strictly speaking, the Court held only that the district court's findings were not clearly erroneous. *Id.*

95. *Id.*

96. Comment, *The 1965 Voting Rights Act: Annexation and Racial Discrimination*, 10 HARV. J. L. & PUB. POL'Y 786 (1987).

97. *Id.*

98. *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

99. *Id.* at 327-28.

100. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566-67 (1969) (legislature intended § 5 to be given "broadest scope possible").

101. *See supra* note 8. As late as 1986 no fewer than 22 states or subdivisions had employed tests for voter eligibility within the meaning of 42 U.S.C. § 1973c (1982). In effect, Pleasant Grove has succeeded in perpetuating itself as an all-white city. The remedy approved by the Supreme Court in *Pleasant Grove* merely checks the city's growth as a "monolithic white voting block." 479 U.S. at 472.

102. *See supra* note 8. Section 5 does not apply to a majority of the states.

* J.D. 1988, Washington University

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